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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1031

MARY WYCHE BOUDREAUX,
Petitioner

VS.

STATE OF MISSISSIPPI
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

INTRODUCTORY STATEMENT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered on September 14, 1977, affirming petitioner's conviction for manufacture of marijuana in the Circuit Court of Adams County, Mississippi. Copies of the judgment of conviction and sentencing order are appended in Appendix A.

OPINION BELOW

Petitioner's conviction was affirmed without opinion by the Supreme Court of Mississippi on September 14, 1977. The Supreme Court of Mississippi denied a petition for rehearing without opinion on October 26, 1977. A copy of the official report of the action of the Supreme Court is appended and marked Appendix B.

JURISDICTION

The judgment of the Supreme Court of Mississippi affirming petitioner's conviction was entered on September 14, 1977. Rehearing was denied on October 26, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Was petitioner's right to Due Process of Law violated by petitioner's conviction and the subsequent affirmance thereof where there is no evidence in the record to support the jury's finding that the substance accused manufactured was in fact marijuana.

2. Were petitioner's Due Process and Sixth Amendment rights violated by the trial court's refusal to require disclosure of the confidential informant whose information was the basis for the issuance of the search warrant in this cause where the informant had "personal knowledge" of the circumstances surrounding petitioner's alleged possession of marijuana.

3. Were petitioner's Fourth and Fourteenth Amendment rights violated by the introduction of alleged marijuana which had been seized pursuant to a search warrant which failed to adequately state the basis of the informant's knowledge that marijuana was at the residence of petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of all people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In March of 1976, petitioner, Mary Wyche Boudreaux, was indicted by the Adams County, Mississippi Grand Jury, along with Robert Drane, for possession of approximately three pounds[1] of marijuana with intent to deliver and for possession of approximately one thousand seedling or sprouting plants of marijuana with intent to manufacture. A copy of said indictment is appended as Appendix C.

Petitioner and her co-defendant were granted a severance (R. 10). Petitioner was tried for possession with intent to deliver and possession with intent to manufacture on July 14, 1976 (R. 58). The jury found

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1. Although petitioner was charged with possession of three pounds, the proof showed that the total weight was from seventeen to twenty-one ounces, most of which was seeds. The usable marijuana would fit in one's hand. (R. 116)

petitioner guilty of possession with intent to manufacture marijuana (R. 223-25). Petitioner was sentenced to five years in the Mississippi State Penitentiary and to pay a five thousand dollar fine and costs (R. 230).

On July 8, 1976, the trial court heard evidence on petitioner's motion to suppress evidence which was the result of an unlawful search and seizure (R. 11, 26-57). A copy of this motion is appended as Appendix D.

Petitioner's motion to suppress challenges the probable cause for the search warrant for failure to set forth the basis for the informant's conclusion that marijuana was present in the house to be searched. [See, paragraph 2b in Appendix D]

At the hearing on the motion to suppress the state called Don Richards, an agent of the Mississippi Bureau of Narcotics (R. 27). Richards testified that on March 20, 1976, he appeared before Judge Robert A. Bonds, a County Judge of Adams County, Mississippi, to request that a search warrant be issued for the search of petitioner's residence (R. 28). He further testified in support of the motion that he submitted to the judge a two page written "Underlying Facts and Circumstances" sheet (R. 28-29). A copy of this "Underlying Facts and Circumstances" sheet, the affidavit for search warrant and the search warrant are appended as Appendices E, F, and G, respectively.

At the hearing Agent Richards testified in much greater detail about the information which he received from these three informants (R. 26-57). However, it is unclear how much, if any, of the detail testified to at the hearing was presented to the judge at the time of the issuance of the search warrant. Richards testified that he

could not remember "verbatim" what he told the judge although he did say, it was

> "[e]ssentially what is contained in my Underlying Facts and Circumstances. Judge Bonds quiz quizzed me as to the reliability of my informant, which I answered him satisfactorily. He asked me a little background information about the particular case, and other than that I can't remember any conversation...." [R. 56]

One thing is, however, abundantly clear and that is that Agent Richards never told the magistrate the basis for the informant's knowledge about what the informant told him for the reason that Agent Richards never asked the informant how the informant knew the marijuana was in petitioner's residence. During the trial, Agent Richards testified:

Q. Did this man [the informant] say that he had seen the marijuana or knew where it was?
A. He said that he knew where it was, yes, sir.
Q. How did he know that?
A. That I don't, sir.
Q. Did you try to find out?
A. Did I try to find out? I don't understand your question.
Q. **Did you try to find out how he knew it was there?**
A. No, sir. (R. 109) [Emphasis added.]

Petitioner renewed her motion to suppress and was granted a continuing objection based on the motion. (R. 66, 67, 125) Petitioner again renewed her objection at R. 61, 117, 125, 131, 155.

The record is barren as to the way in which the "personal knowledge" referred to in the "Underlying Facts and Circumstances" sheet was acquired. Even had Officer Richards told the judge all the information which he claimed to have obtained from the informant, the record would nevertheless fall short of probable cause because each and every bit of information is conclusory and does not show how the informant obtained his knowledge.

The trial judge overruled petitioner's motion to suppress. A copy of the order is appended as Appendix H.

At petitioner's trial, the state called James Williams, a toxicologist from the Mississippi Crime Lab, to testify as to the identity of the substances taken from petitioner's home (R. 157-172). Nowhere in the record, however, does Williams identify any of the seedling or sprouting plants as marijuana. The seedling or sprouting plants with which petitioner was charged were contained in five pie plates which were Exhibits 1-5 at petitioner's trial (R. 125). Williams' testimony is set forth in Appendix I.

Petitioner argued that the evidence was insufficient to support a conviction at trial on motion after the state's evidence (R. 183) at the close of defendant's case (R. 196, 209) by motion after the verdict (R. 226 and 228) and on appeal.

The state relied on the theory of constructive possession to convict petitioner (See, State's instruction S-6 at R. 207). Petitioner was convicted solely on circumstantial evidence. Officers of the Adams County Sheriff's Department served a search warrant at petitioner's home

which was jointly occupied by her co-indictee, Robert Drane, and her teenage son, and seized certain items, some of which turned out to be marijuana. Petitioner was not present at the time of the search (R. 65-66, 102). The officers gained entry to the house by untying a piece of twine which had been wound around a nail on the back door (R. 66) There is no evidence in the record at trial to indicate that petitioner exercised any actual control over the marijuana. Petitioner was convicted solely because the alleged contraband was found at her house.

The "Underlying Facts and Circumstances" sheet sworn to by Agent Richards (see, Appendix E) discloses that three informants[2] provided him with information regarding the presence of contraband in the Boudreaux residence. According to Richards, the first informant, whom Richards did not believe was reliable, told him that "Robert Drane had gone to Baton Rouge, Louisiana, and brought back some marijuana. The informant further stated that **Drane** had the marijuana in his house off airport [sic] road where he lived with Mary Boudreaux" (R. 31). [Emphasis added.] Richards' testimony at the motion to suppress is somewhat inconsistent regarding this first informant in that he testified that this informant "stated to me that **Robert Drane and Mary Boudreaux** had some marijuana" (R. 32). [Emphasis added.]

According to the "Underlying Facts and Circumstances" sheet, the second informant, whom Richards

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2. According to Richards, the first two informants were not known to him to be reliable. (R. 32-33 and Appendix E)

did not believe to be reliable, told Richards "that **Robert Drane** had driven a yellow Toyota pickup truck to Baton Rouge and obtained several pounds of marijuana which he had brought back to Natchez. The informant further stated that **Drane** had the marijuana at his house near the Adams County Airport." (R. 31) [Emphasis added.] Richards' testimony at the hearing on the Motion to Suppress was also that it was Robert Drane who had marijuana for sale and that it was Drane who had gone to pick up the marijuana in Baton Rouge (R. 33). The second informant did not tell Richards that Mary Boudreaux possessed any marijuana.

According to the Underlying Facts and Circumstances sheet, the third informant had provided Richards "with reliable information in the past." (R. 31). This informant told Richards that "he had personal knowledge that marijuana was in the house jointly occupied by Robert Drane and Mary Boudreaux." (R. 31) This allegation in the fact sheet is the only statement therein which deals with what this third informant knew about the marijuana, and it is ambiguous as to who had actual possession of the marijuana and in fact how the informant obtained "personal knowledge" of the location of the marijuana. At the hearing for the motion to suppress, Richards went into more detail about what the informant told him. However, as petitioner has already pointed out, it is unclear how much, if any, of this detail was given to the judge prior to the issuance of the search warrant (See pp. 5-7, **supra**).

At the hearing, Richards testified that the informmant told him "that they knew that **Robert Drane** had

gone to Baton Rouge to pick up some marijuana. [The informant] stated that Mr. Drane normally went down there with a brown suitcase, picked up the marijuana and brought it back in that suitcase" (R. 46). At the hearing Richards further testified that,

> The informant stated to me that he had personal knowledge that Robert Drane had in his possession a quantity of marijuana. The informant stated to me at our meeting that morning that Robert Drane had driven to Baton Rouge, Louisiana, and picked up the marijuana as he had done on previous occasions. He stated that Mr. Drane had come back to his residence there where he was living at the house occupied by Mrs. Boudreaux and that he had broken the marijuana down and he had put it in one pound bags for distribution to individuals who would sell it for him (R. 34).

Later in the hearing Richards on cross-examination testified as follows.

Q. O.k. Did either one of the confidential informers, or any of the three of them, particularly the reliable one since it was the only one you listened to, tell you that Mary Boudreaux had any marijuana.
A. The information that I had initially from this reliable informant was that Robert Drane and Mary Boudreaux had some marijuana.
Q. Now, that's not what you said to begin with. You said that he told you that Robert Drane had gone to Baton Rouge and had gotten marijuana and was breaking it up and selling it was at the property owned by Mary Boudreaux, but you didn't say that this informant said anything about Mary Boudreaux.
A. I didn't understand that you wanted me to quote verbatim what the individual had said.
Q. I would very much like for you to do so, if you could.
A. O.k., he said that Robert Drane and Mary Boudreaux had some marijuana.
Q. Now, this is the first time that Mary Boudreaux's name has come into this other than the property.

BY MR. BENOIST:

No, sir, your Honor, we are going to object to him saying that in the record because that's not true. He stated over and over again that Drane had gone to Baton Rouge and brought some marijuana back and it was at the house where he lived with Mary Boudreaux.

BY MR. BOURLAND:

Well, that's exactly what I just said.

BY THE COURT:

All right, let's proceed. (R. 53-54)

At the hearing, Richards also testified that "[m]y information had been that Mr. Drane and Mrs. Boudreaux were travelling to Baton Rouge and they would always take a brown suitcase and pick up the marijuana and bring it back in this suitcase" (R. 37).

On April 1, 1976, prior to trial, petitioner filed a "Motion for Production and Disclosure of Evidence" wherein petitioner requested, among other things, "[t]he identity and any information, oral or written, which was obtained from anonymous informers along with their identity, either of which may have been used by the State of Mississipp [sic]" (R. 6). Petitioner's motion requested this information so that she could "fairly prepare [her] defense" (R. 4). A copy of petitioner's motion is appended as Appendix J.

On July 8, 1976, the trial court considered petitioner's "Motion for Production and Disclosure of Evidence" (R. 20-26). The state objected to disclosing the identity of the informant, and the trial court sustained the state's objection (R. 22,25). At this time counsel for petitioner requested disclosure for an additional reason other than that stated in her disclosure motion. Petitioner argued that "there are no confidential informants and there never have been and that they do not exist and it's being used strictly as a subterfuge for the State to go on to private property and to obtain search warrants and to act a fraud upon the Court" (R. 22).

Petitioner again renewed her request for the informants' names at the trial (R. 106). At this point petitioner's attempts to secure the names of the informants made it clear that petitioner needed the names to help in the defense of the case on its merits and were not directed solely to question the legality of the search (R. 107). When the prosecution stated that the disclosure went only to the legality of the search, counsel for petitioner specifically denied this stating, "this goes to the merits of the case and has nothing to do with the search warrant" (R. 108). As clearly stated, Petitioner's contention was that "she is constitutionally entitled [to the name of the informant] if that informant had any actual reliable knowledge" (R. 112). Once again, the trial judge refused to order disclosure of the names (R. 106-113). Significantly, the state never alleged what prejudice, if any, it would suffer were the names revealed. No hearing was held on this issue. The petitioner throughout her trial contended that if the informant was a witness or had reliable knowledge concerning the possession or

planting of marijuana, the name should have been revealed to her so that she could adequately defend the case against her.

All three questions presented in this petition were presented at the trial court as already indicated and were raised and argued on appeal. (See, Propositions One, Two and Three of Brief of Appellant.) Additionally, petitioner argued questions two and three in her Petition for Rehearing before the Mississippi Supreme Court (See, Propositions One and Two of the Petition for Rehearing).

REASONS FOR GRANTING THIS WRIT

I.

Petitioner submits that the decision affirming her conviction where there was no evidence of guilt is inconsistent with prior decisions of this Court.

ARGUMENT

Petitioner was convicted of possession of approximately 1000 seedling plants of marijuana with intent to manufacture. In order to establish that these plants were in fact marijuana, the prosecution called James M Williams, a toxicologist from the Mississippi State Crime Lab. Numerous exhibits other than the seedling plants (Exhibits 1 - 5) were introduced at petitioner's trial and were analyzed and testified about by Williams. However, a careful examination of Williams' testimony which is contained in Appendix I shows that Williams did not

identify the exhibits containing the plants as containing marijuana.

Numerous decisions of this Court hold that due process requires that a state must prove every ingredient of an offense beyond a reasonable doubt. Eg., *Patterson v. New York*, ___ U.S. ___, 97 S.Ct. 2319, 2330 (1977); *Henderson v. Kibbe*, ___ U.S. ___, 97 S.Ct. 1730, 1736 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1972, 25 L.Ed.2d 368 (1970). In the instant case, the state wholly failed to prove with any evidence that the substance which petitioner possessed was marijuana; therefore, petitioner's case should be reversed. Where there is no evidence to support a particular element of a crime, due process forbids conviction. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

II

In rejecting petitioner's claim that the names of the confidential informants should have been disclosed to her, the Supreme Court of Mississippi has decided a substantial federal question not previously explicitly determined by this Court in a way which is not in accord with this Court's prior decisions.

ARGUMENT

Roviaro v. United States, 353 U.S. 53, 77 S.Ct.

623, 1 L.Ed.2d 639 (1957), outlines the test which must be used in order to determine whether or not the identity of a confidential informant must be revealed to the defendant. The Court in *Roviaro* held that "[w]here the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the privilege of the government to withhold the identity of the informant must give way. 353 U.S. at 69, 77 S.Ct. at 628, 1 L.Ed.2d at 649.

The Court declined in *Roviaro* to define a fixed rule with respect to disclosure stating,

> The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other related factors.

353 U.S. at 62, 77 S.Ct. at 629, 1 L.Ed.2d at 646. In *Roviaro*, the Court went on to order the disclosure of the identity of an informant who was a material witness in setting up and participating in a drug sale.

Later, in *McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L.Ed.2d 62 (1967), this Court distinguished *Roviaro* and declined to hold that production was required where the issue is not guilt or innocence, as in *Roviaro*, but merely the question of probable cause for the search.

By motion prior to trial and during trial, Petitioner

asserted that disclosure was necessary for her defense on the merits. (See pp. 11-13, supra). The basis for petitioner's assertion was that if the informants had some reliable personal knowledge regarding the alleged possession and proposed planting of marijuana,[3] then as material witnesses, petitioner was entitled to their names.

There is no proof in the record that petitioner had actual possession of the drugs in question. She was prosecuted and convicted on the theory of constructive possession because the contraband was found in her residence, even though the testimony showed that two other persons also occupied that residence. If the confidential informants, in fact, had any reliable information regarding the possession of the drugs and plants in question, it would be manifestly unfair for the State of Mississippi to withhold the names of persons who could possibly place that possession in the hands of someone other than defendant. The officer's Underlying Facts and Circumstances sheet puts the possession of the drugs into the hands of **Robert Drane** (Appendix E). Similarly, at the hearing on the motion to suppress, Richards continued on several occasions to state that the informants told him that **Drane** had possession (R. 26-57). It was not until late in the cross-examination that Richards ever said that any of his informants had said "Robert Drane and Mary Boudreaux had some marijuana" [Em-

3. In order to sustain the search warrant, the trial court must have found that the informants' information was reliable enough to establish probable cause; yet, on the other hand, to deny disclosure, the trial court had to find that it was not material or relevant to petitioner's defense to the crimes charged. Petitioner finds these holdings inconsistent.

phasis added.] (R. 54), and only then in response to a direct question (R. 53-54). This statement is somewhat inconsistent with the fact sheet which states that the that the first informant "told me that Robert Drane had gone to Baton Rouge, Louisiana, and brought back some marijuana. The informant states that Drane had the marijuana in his house off airport road [sic] where he lives with Mary Boudreaux." Petitioner submits that if the information was that both Drane and Boudreaux were in possession of the marijuana, Richards would have more simply stated the foregoing as Drane and Boudreaux have possession of this marijuana at her house rather than the more awkward sentence structure which he used. The same is true for the information of the second and third informants. (See Appendix E)

Utilizing the balancing test called for in *Roviaro*, we have on the one hand the possibility that the informants have information relevant to petitioner's defense on the merits. Because petitioner was convicted on the theory of constructive possession, any knowledge by the informants regarding the actual possession of the drugs was highly relevant to petitioner's defense. Balanced against disclosure, we have only the bare assertion by the prosecution of the privilege. The state asserted no specific prejudice which would occur if disclosure were ordered. This Court has considered the effect of the assertion of a privilege based only on a generalized interest in confidentiality in a similar situation. In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Court considered the effect of the confidentiality of presidential communications. In speaking of privilege in general, the Court said that

"these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." 418 U.S. at 710, 94 S.Ct. at 3108, 41 L.Ed.2d at 1065. The Court went on to say that "[t]he right to the production of all evidence at a criminal trial has constitutional dimensions." 418 U.S. at 712, 94 S.Ct. at 3109, 41 L.Ed.2d at 1066. The Court stated that withholding relevant evidence would violate a defendant's rights to due process of law and that "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending trial." 418 U.S. at 713, 94 S.Ct. at 3110, 41 L.Ed.2d at 1066. Petitioner submits that the application of these principles requires disclosure in her case.

III

In rejecting petitioner's Fourth Amendment claim that the search warrant was issued without probable cause, the Supreme Court has decided a federal question of substance in a manner which is inconsistent with prior decisions of this Court. Furthermore, in view of this Court's decision in *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), which effectively forecloses consideration of petitioner's Fourth Amendment claims by way of Federal Habeas Corpus, this Court is the only Court in which petitioner's Fourth Amendment claims may be vindicated.

ARGUMENT

The Fourth Amendment forbids the issuance of search warrants without probable cause. Evidence seized

in violation of the Fourth Amendment is not admissible in state court prosecutions. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Before a search warrant may be issued, the judicial officer issuing the warrant must be supplied with enough information to make an independent judgment that probable cause exists for the warrant. Eg., *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Probable cause to support the issuance of a search warrant can be established by setting forth in the affidavit for search warrant the incriminating personal observations of a reliable person, Eg., *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965); or probable cause may be established from hearsay information communicated to the affiant by an informant. Eg., *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). However, where the information sought to establish probable cause is based on hearsay communicated by an informant to the affiant rather than on the personal observations of the affiant, the information must be "reasonably corroborated by other matters within the [affiant's] knowledge." *Jones v. United States*, 362 U.S. at 269, 80 S.Ct. at 735, 4 L.Ed.2d at 707. An affidavit does not establish probable cause where it merely states the affiant's belief that there is probable cause to search without stating the facts upon which that belief is based. Eg., *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933). Nor is it sufficient where it states only the belief of the informant. *Jones v. United States*, 362 U.S. at 269, 80 S.Ct. at 735, 4 L.Ed.2d at 707.

Before a search warrant may be issued based on hearsay information from an informant, the issuing "magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citations omitted], was 'credible' or his information 'reliable'." *Aguilar v. Texas*, 378 U.S. at 114, 84 S.Ct. at 1514, 12 L.Ed.2d at 728. The information presented to the issuing magistrate[4] in petition-

4. At the hearing on the motion to suppress, the agent who secured the search warrant went into substantially more detail about the information he received from his informants than is contained in the Underlying Facts and Circumstances Sheet which he submitted to the magistrate. On appeal, the State of Mississippi in its brief argued that the warrant was valid because this additional information was also given to the magistrate and provided sufficient corroboration of the informant's information. (See, Appellee's Brief at pp. 5-6). However, the record provides no support for this contention that the magistrate had before him any information than was contained in the underlying facts and circumstances sheet. In fact, the weight of the evidence is to the contrary. For example, Agent Richards in his testimony at the hearing testified to the information contained on the fact sheet and stated that he testified to that information before the magistrate. Richards then went into much greater detail about his information but when asked to state "verbatim" which information he had given to the judge, he was unable to do so (R. 56). He could remember only that the judge "quizzed" him about the reliability of his informant and "a little background information about the particular case" (R. 56). Other than that Richards could state only that he had told the

(footnote continued on next page)

er's case wholly fails to satisfy the first requirement of *Aguilar* which requires that the magistrate be informed of some of the underlying facts and circumstances from which the informant concluded that the drugs were located at petitioner's residence. In fact, it would have been impossible for this information to have been before the magistrate for the reason that Agent Richards never asked the informant how he knew the marijuana was at petitioner's residence. In response to the question, "Did you try to find out how he knew it was there," Richards replied, "No, sir" (R. 109). There was, therefore, never any information before the issuing magistrate to indicate that the information of the third informant, even though Richards said he was reliable, was anything other than an unfounded belief based on rumour.

As for the other two informants, Richards himself stated that they were not reliable. (See Appendix E) Since the third informant's tip is clearly inadequate under *Aguilar*, the question then is whether or not the information from these two admittedly unreliable informants can bolster the conclusory belief of the third informant to the level of probable cause. See, *Spinelli v. United States*, 393 U.S. 410, 415, 89 S.Ct. 584, 588, 21

footnote 4 continued...

judge "[e]ssentially it was what is contained in my Underlying Facts and Circumstances." The burden is on the prosecution to establish what information was given to the magistrate, Beck v. Ohio, 379 U.S. 89, 97 S.Ct. 223, 229, 13 L.Ed.2d 142 (1964); and in this case, the prosecution failed to demonstrate that the magistrate had any specific information before him other than that which was contained in Agent Richards' Underlying Facts and Circumstances Sheet.

L.Ed.2d 637, 638 (1969). It should be remembered that not only were these two informants not considered by Agent Richards to be reliable but that their information is also deficient in that it is no more than conclusory allegations unsupported by any facts as to how they arrived at their belief that marijuana was at petitioner's residence. This Court has never held that an informant's tip which fails to give the basis for the informant's belief can be bolstered by information from other sources of unknown reliability whose information is similarly deficient. To do so, would be to hold that rumour may be verified by rumour. This Court has stated that in the absence of a statement detailing the source of an informant's information, the information before the magistrate must be sufficiently detailed so that "the magistrate may know that he is relying on something more substantial than a casual rumour circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli v. United States*, 393 U.S. at 416, 89 S.Ct. at 589, 21 L.Ed.2d at 644.

Since the only information which was before the magistrate is that which is contained on the Underlying Facts and Circumstances Sheet (See Footnote 5, supra), we are confined to that document in considering probable cause. In *Aguilar v. Texas*, this Court stated, "[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention. *Giordenello v. United States*, 357 U.S. 480, 486, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503, 79 C.J.S. Searches and Seizures, 74, p. 872 (collecting cases)." 378 U.S. at 109, note 1, 84 S.Ct. at 1511, note 1, 12 L.Ed.2d at 725, note 1.

The Underlying Facts and Circumstances Sheet in the instant case is not so detailed that a magistrate "could reasonably infer that the informant had gained his information in a reliable way," *Spinelli v. United States*, 393 U.S. at 417, 89 S.Ct. at 589, 21 L.Ed.2d at 644. The first informant simply stated that "Robert Drane had gone to Baton Rouge, Louisiana, and brought back some marijuana" and that "Robert Drane had the marijuana in his house off airport road [sic] where he lives with Mary Boudreaux." (Appendix E) The only additional detail added by the second informant was that Drane had driven a yellow Toyota pickup truck and obtained several pounds of marijuana. The third informant related only that "he had personal knowledge that marijuana was in the house jointly occupied by Robert Drane and Mary Boudreaux early on the morning of 20 March, 1976, and is believed by him to still be there." (Appendix E) The detail supplied by all three informants simply does not rise to the inference that their information is anything other than rumour.

In *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), this Court dealt with a tip which did rise to that inference. The evidence in *Draper* established

> ...that one Marsh, a federal narcotic agent with 29 years' experience, was stationed at Denver; that one Hereford had been engaged as a "special employee" of the Bureau of Narcotics at Denver for about six months, and from time to time gave information to Marsh regarding violations of the narcotic laws, for which Hereford was paid small sums of money, and that Marsh had always found

> the information given by Hereford to be accurate and reliable. On September 3, 1956, Hereford told Marsh that James Draper (petitioner) recently had taken up abode at a stated address in Denver and "was peddling narcotics to several addicts" in that city. Four days later, on September 7, Hereford told Marsh "that Draper had gone to Chicago the day before [September 6] by train [and] that he was going to bring back three ounces of heroin [and] that he would return to Denver either on the morning of the 8th of September or the morning of the 9th of September also by train." Hereford also gave Marsh a detailed physical description of Draper and of the clothing he was wearing, (footnote omitted) and said that he would be carrying "a tan zipper bag," and that he habitually "walked real fast."

358 U.S. at 309, 79 S.Ct. at 331, 3 L.Ed.2d at 329. Furthermore in *Draper*, unlike the instant case, the agent made an independent verification of all of the information given to him by his source except whether or not Draper had accomplished his mission and had heroin on his person. In finding that probable cause existed, this Court said, "surely, with every bit of Hereford's information—that Draper would have the heroin with him—was likewise true." 358 U.S. at 313, 79 S.Ct. at 333, 3 L.Ed.2d at 332.

The information from the two informants of unproven reliability adds nothing to the information of the third informant of proven reliability. Had the source of their knowledge been given or had their tips been sufficiently detailed and verified as in *Draper*, their information might have aided the information given by the third informant. However, since the information from all three taken together rises no higher than the inference

of rumour, petitioner's challenge to the validity of the search warrant should have been sustained, and the evidence seized pursuant to that warrant should have been suppressed.

Respectfully submitted,

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MOORE, EPPS AND SELPH
BARNETT, MONTGOMERY, McCLINTOCK
AND CUNNINGHAM
Of Counsel

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. **NO 6812**

Mary Wyche Boudreaux

This day came the State of Mississippi by her District Attorney and the accused, **Mary Wyche Boudreaux**, being placed at the bar of the Court in the custody of the Sheriff of this County, and having been arraigned upon the Bill of Indictment filed herein, and a plea of "not guilty" to the charge of **Possession with Intent/** manufacture to filed in said Indictment having been entered, a jury composed of **Mrs. Willie A. Cauthen** and eleven other good and lawful citizens being called, who being duly elected, empaneled and sworn the issue joined to try, after hearing the evidence, arguments of counsel and receiving the instructions of the Court, retired to their room to consider their verdict, afterwards returned into Open Court the following verdict:

We the jury find the defendant guilty of possession with

intent to manufacture marijuana

Thereupon, the Defendant, **Mary Wyche Boudreaux**, was remanded to the custody of the Sheriff to await sentence.

R.225

STATE OF MISSISSIPPI

VS. 6812

Mary Wyche Boudreaux

Now on this day the defendant, **Mary Wyche Boudreaux** being placed at the bar of the Court in the custody of the Sheriff of this County, and represented by counsel, and asked if she has any thing to say why the sentence of the Court should not be passed upon her for **Possession with Intent to manufacture** offered nothing.

THEREUPON, it is ordered by the Court that the said **Mary Wyche Boudreaux** be safely moved and conveyed to the State Penitentiary and that she, the said **Mary Wyche Boudreaux**, be imprisoned and confined in the said Penitentiary as a convict for a period of **five (5) years** from this the **16** day of **July 1976**. and to pay a fine of $5000.00 and all costs. Bond set at $10,000.00.

R. 230

APPENDIX B

Mary Wyche BOUDREAUX

v.

STATE of Mississippi.

No. 49892.

Supreme Court of Mississippi.

Sept. 14, 1977

Rehearing Denied Oct. 26, 1977.

Appeal from Circuit Court, Adams County; Lenox L. Forman, Judge.

Gwin & Gwin, R. Brent Bourland, Natchez, for appellant

A.F. Summer, Atty. Gen. by Robert D. Findley, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before INZER, P. J., and ROBERTSON and BOWLING, JJ.

AFFIRMED.

350 So.2d 688 (Miss. 1977)

APPENDIX C

THE STATE OF MISSISSIPPI, CIRCUIT COURT
Adams County MARCH Term, A.D., 1976
ADAMS COUNTY No. 6812

THE GRAND JURORS of the State of Mississippi. taken from the body of the good and lawful citizens of Adams County, elected, empaneled, sworn and charged to inquire in and for the said County of Adams, at the term aforesaid, of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oath, present that Mary Wyche Boudreaux and Robert Drane late of the County aforesaid, on the 20th day of March, 1976, in the County aforesaid, did wilfully, unlawfully and feloniously possess approximately three (3) pounds of the controlled substance known as marijuana with intent of them, the said Mary Wyche Boudreaux and Robert Drane to deliver said marijuana for monetary value, and that they did further, then and there, possess with the intent to manufacture approximately one thousand (1000) seedling plants or sprouting plants of the controlled substance known as marijuana contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

/s/Edwin E. Benoist, Jr.
District Attorney

A True Bill

POSSESSION WITH INTENT TO MANUFACTURE AND DELIVER (Charge) /s/Stanton W. Causey
Foreman of the Grand Jury.

WITNESSES: Don Richards, Tommy Ferrell

Filed 25th day of March, 1976 /s/Clerk
Recorded day of 19
Clerk By D.C.

(R. 2)

APPENDIX D

IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. C. No. 6812

MARY WYCHE BOUDREAUX and ROBERT DRANE DEFENDANTS

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS BASED ON ILLEGAL SEARCH AND SEIZURE

STATE OF MISSISSIPPI
COUNTY OF ADAMS

This day personally appeared before me, the undersigned authority in and for the County and State aforesaid, MARY WYCHE BOUDREAUX and ROBERT DRANE, who being first duly sworn, on the their [sic] oath depose and say;

That they are the Defendants in the above entitled criminal proceeding.

That on or around March 20, 1976, they were arrested and charged with violation of the uniform controlled substances law, Mississippi Code of 1972, Annotated, being specifically, to-wit: possession with intent to manufacture.

That on or around March 20. 1976, in the evening Don Richards, an agent of the Mississippi Narcotics Bureau, and members of the Adams County Sheriff's Department entered property lying north and west of Artmann Road in Adams County, Mississippi, and searched the house and surrounding grounds thereof. That said officers seized an amount of plant matter alleged to be Cannabis Sativa from said property.

The search and seizure was conducted pursuant to a search warrant issused [sic] by Judge Robert A. Bonds of the County Court of Adams County, Mississippi, on March 20, 1976.

A copy of the warrant and supporting affidavit are annexed hereto.

We are informed by counsel that the supporting affidavit is insufficient as a matter of law for the following reasons:

a) It sets forth information purportedly received from an informant. The indentity [sic] of the informant is not disclosed.

b) The affidavit alleges that the informant is reliable but sets forth no facts showing why he is considered credible. Nowhere does the affidavit state the circumstances underlying this conclusion. Accordingly, since the reliability of the "information" was not established, the tip did not constitute probable cause to believe that a search of the premised [sic] would uncover narcotic drugs.

On information and belief the alleged informant does not exist; the Sheriff's office and the Mississippi Narcotics Bureau contrived the tip as a pretext to invade premises. Further, the search warrant is defective

in that the land to be searched are inadequately described and the warrant fails to determine what specificity the area of Adams County, Mississippi, which is to be searched by the State Narcotics Bureau and Adams County Sheriff's Department.

We are advised by counsel that the search and alleged seizure described in the preceding paragraph, being conducted pursuant to a defective warrant, was in violation of our rights of privacy under the Fourth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, we respectifully [sic] request that this Court grant an order suppressing the evidence herein and prohibiting its use at trial.

s/Mary Wyche Boudreaux
MARY WYCHE BOUDREAUX

s/Robert Drane
ROBERT DRANE

Sworn to and subscribed before me by Mary Wyche Boudreaux and Robert Drane this 7th day of July, 1976.

s/R. Brent Bourland
NOTARY PUBLIC
My commission expires:
RECEIVED AND FILED
July 8, 1976
A.V. DAVIS, CIRCUIT CLERK
by s/P. Frank, D.C.

APPENDIX E

UNDERLYING FACTS AND CIRCUMSTANCES

I, Don Richards, am an agent with the Mississippi Bureau of Narcotics and make this statement of facts at 0900 hrs., 20 March, 1976, in the office of Bill McGhee in Natchez, Ms. At approximately 2015 hrs 19 March, 1976, a confidential informant telephoned me at my residence and told me that Robert Drane had gone to Baton Rouge, La., and brought back some marijuana. The informant further stated that Drane had the marijuana in his house off airport road where he lives with Mary Boudreaux. At approximately 2242 hrs. 19 March, 1976, I saw an informant at the Kings Tavern, Jefferson St., Natchez, Ms. who told me that Robert Drane had driven a yellow Toyota pickup truck to Baton Rouge and obtained several pounds of marijuana which he had brought back to Natchez. The informant further stated that Drane had the marijuana at his house near the Adams County airport.

At approximately 0650 hrs. 20 March, 1976, a confidential informant who has provided me with reliable information in the past, called me at my residence and asked that I immediately drive to his house. I drove to the informant's house and met him at approximately 0720 hrs. The informant stated that he had personal knowledge that marijuana was in the house jointly occupied by Robert Drane and Mary Boudreaux early on the morning of 20 March, 1976, and is believed by him to still be there. I left the informant at approximately 0750 hrs. 20 March, 1976, and drove to the office of

Bill McGhee where this statement was written. The informant who I met at 0720 hrs. 20 March, 1976, has furnished me drug-related information in the past which proved to be reliable information. I have reason to believe his information concerning the marijuana at the house of Mary Boudreaux and do believe this informant.

/s/Donald H. Richards

Sworn to and subscribed before me this 20th day of March, 1976.

Robert A. Bonds
County Judge, Adams Co.

(R. 31)

APPENDIX F

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AFFIDAVIT FOR SEARCH WARRANT

STATE OF MISSISSIPPI
COUNTY OF ADAMS

This day personally appeared before me, the undersigned judicial officer of said county, Don Richards, agent for the Mississippi Bureau of Narcotics, on information and belief and known to me to be credible persons, who, after having been first duly sworn, depose and say:

1. That affiants have good reason to believe and do believe that certain things hereafter described are now being concealed in or about the following place in this County: *(here particularly describe the place to be searched.)* The house, outhouses and land consisting of 100 acres more or less being part of the Quarters Tract lying north and west of Artmann Road leading from Milford Church to the Airport in District 4 of Adams County and described as Block 1, Lot 23 on map 142 of the maps of Adams County, Miss.

2. That the place described above is occupied and controlled by: Mary Wyche Means Boudreaux

3. That said things are particularly described as follows: *(here describe the thing or things to be seized, taking care to describe only those things which affiants have probable cause to believe and do believe are concealed at the place described above, and with enough*

particularity to insure that an uninformed office will not seize one thing under a warrant describing another. Mere evidence is not a proper subject of a search and seizure. Certain things subject to search and seizure include, in addition to the specific subjects enumerated in the Code, all contraband; instrumentalities used in the commission of a crime; and books, writings, pictures and prints adjudged in a proper proceeding by a proper court to be obscene.) Marijuana (Cannabis Sativa) as defined in Sub-Para "R" of Section 41-29-105 Code of 1972, Mississippi and Section 41-29-139, Sub-Para "A".

4. That possession of the above described things is in itself unlawful for the public has a primary interest in or, primary right to possession of, the above described things), in that said things are: *(here state briefly the use and intention for use of the specified things, citing the appropriate Code section or ordinance being violated and charging its violation, and a brief narrative account of the offense being committed.)* in violation of Schedule 1, sub-sect (d) Article 3, Chapter 29, Uniform Controlled Substances Law, Mississippi; Code 1972 Annotated and changes thereto

5, The facts tending to establish the foregoing grounds for issuance of a Search Warrant are shown on a sheet headed "Underlying Facts and Circumstances" which is attached hereto, made a part hereof and adopted herein by reference. *(The attached sheet must contain enough of the underlying facts and circumstances to enable the issuing officer to fairly ascertain that probable cause exists for the issuance of the warrant. All persons having knowledge of the facts should sign the affidavit*

and attached sheet, be identified throughout by name, and appear before the issuing officer for examination.

Information obtained from informants must be described as reliable and the informants identified as credible persons. It is not absolutely essential that the identity of the informants be disclosed, but there must be shown enough of the underlying facts and circumstances from which the affiants conclude that the informants are credible and their information reliable.

Avoid vague recitals such as "suspect was observed" and "The Sheriff's office received information." Use factual recitals showing names, places, times and dates, in commonsense, non-technical language. Be specific and give the information in detail.)

6. WHEREFORE, affiants request that a search warrant issue directing a search of the above described place and seizure of the above described things.

/s/Don Richards
Affiant

Sworn to and subscribed before me, the 20th day of March, 1976.

/s/Robert A. Bonds
County Judge

(R.30)

APPENDIX G

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SEARCH WARRANT

STATE OF MISSISSIPPI
COUNTY OF ADAMS
TO ANY LAWFUL OFFICER OF ADAMS COUNTY,

WHEREAS, Don Richards, agent for the Mississippi Bureau of Narcotics, known to me

1. That affiants have good reason to believe and do believe that certain things hereafter described are now being concealed in or about the following place in this County: the house, outhouses and land consisting of 100 acres more or less being part of the Quarters Tract lying north and west of Artmann Rd. leading from Milford Church to the airport in Dis. 4 of Adams County and described as Block 1, Lot 23 on map 142 of the maps of Adams County, Mississippi together with all approaches and appurtenances thereto.

2. That the place described above is occupied and controlled by: Mary Wyche Means Boudreaux

3. That said things are particularly described as follows: A quantity of the substance known as Marijuana (Cannabis Sativa L)

4. That possession of the above described things is in itself unlawful (or the public has a primary interest in, or primary right to possession of, the above described things), in that said things are: in violation of Schedule 1, sub-section "d" Article 3, Chapter 29 Uniform Con-

trolled Substances Law, Mississippi, Code 1972, Annotated and changes thereto

5. The facts tending to establish the foregoing grounds for issuance of a Search Warrant are shown on a sheet headed "Underlying Facts and Circumstances" which is attached hereto, made a part hereof and adopted herein by reference.

6. This Court, having examined and considered said affidavit, and also having heard and considered evidence in support thereof from the affiants named therein does find that probable cause for the issuance of a search warrant does exist. THEREFORE, you are hereby commanded to proceed at any time in the day or night to the place described above and to search forthwith said place for the things specified above, making known to the person or persons occupying or controlling said place, if any, your purpose and authority for so doing, and if the things specified above be found there to seize them, leaving a copy of this warrant and a receipt for the things taken; and bring the things seized before this Court instanter; and prepare a written inventory of the items seized, and have then and there this writ, with your proceedings noted thereon.

7. Do not interpret this writ as limiting your authority to seize all contraband and things the possession of which in itself is unlawful which you find incident to your search, or as limiting your authority to make otherwise valid arrests, at the place described above.

Witness my hand this, the 20th day of March, 1976.

/s/Robert A. Bonds
County Judge

RETURN

I received this warrant on the 20 day of March, 1976, and have executed it as follows:

On the 20 day of March, 1976, at 3:45 P.M., I searched the place described in said warrant and I left a copy of the warrant with the person occupying and controlling said place, together with a receipt for the items seized.

The following is an inventory of the things taken pursuant to the warrant:

1) Brown suitcase w/marijuana;
2) Brown suitcase w/marijuana;
3) Amco card containing seeds;
4) Box peat pots
5) 2 boxes plastic bags
6) 5 pans containing germinating seeds
7) 8 packs rolling papers
8) 3 smoking pipes
9) 1 set adjustable scales
10) blue container w/seeds & dice
11) 1 cigarette roller
12) 2 prescription bottles containing unknown tablets
13) 1 prescription bottle containing unknown tablet

14) 1 small bottle containing liquid and tooth-picks
15) plastic bag containing seeds, paper, & marijuana
16) Driver's lic. of Hart L. Fortenberry
17) 1 receipt to Mary Boudreaux from Chester Williams
18) 1 plastic bag containing seeds

This inventory was made in the presence of Dempsey Newman, MBN, Tommy Ferrell, Adams SO and R.E. Stutzman, Adams SO.

I swear that this Inventory is a true and detailed account of all the things taken by me on the warrant.

/s/Don Richards

Subscribed and sworn to and returned before me this the 22 day of March, 1976.

s/A.V. Davis by J.M. Nell, D.C.
(R. 30)

APPENDIX H

IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI — PLAINTIFF

VS. — NO. 6812

MARY WYCHE BOUDREAUX — DEFENDANT
and
ROBERT DRANE

ORDER OVERRULING MOTION TO QUASH SEARCH WARRANT

This cause came on this day for hearing upon the various Motions to Quash the Search Warrant in this case and the Court, after maturely considering all of same, is of the opinion that the same should be, and is hereby overruled.

SO ORDERED on this the 8th day of July, 1976.

/s/Lenox L. Forman
L. L. FORMAN
CIRCUIT JUDGE

(R. 16)

APPENDIX I

DIRECT EXAMINATION

BY MR. BENOIST:

Q. State your name, please?

A. James M. Williams.

Q. And your occupation?

A. I am a Toxicologist with the Mississippi Crime Lab.

Q. How long have you been so employed?

A. Since July of 1968.

Q. Now, what are your educational achievements, Mr. Williams?

A. I have a Bachelor of Science degree in both chemistry and biology from Arkansas State University. I worked five years as a chemist for the Tetrolite Corporation in St. Louis, Missouri. I then returned to Arkansas State University to complete two more years in the field of chemistry and biology. I then worked five years as a pharmasudical representative for the Up-John Company. In January of 1968 I joined the staff at the University of Mississippi Medical Center in the Department of Pharmacology and Toxicology as an assistant to Doctor Humes, and in July of that year I became associated full time with the Mississippi Crime Lab, and I have been so employed ever since.

BY MR. BENOIST:

Your Honor, we would like to submit that Mr. Williams is a thoroughly qualified forensic chemist, or chemical analist [sic].

BY THE COURT:

All right.

BY MR. BENOIST:

Q. Now, Mr. Williams, I'll ask whether or not you had occasion on or about March 23rd and on March 31st of this year to receive certain exhibits from an agent—to find certain exhibits that had been tendered to the Crime Lab by Agent Don Richards?

A. Yes, sir, I did.

Q. Would you just state so the Jury will know, is the Crime Lab a part of or in any direct way connected with the Mississippi Bureau of Narcotics?

A. No, sir, not directly. We are a division of the Department of Public Safety, as they are a division under the Department of Public Safety.

Q. All right, sir. Do you mind if I call you Mickey?

A. No, sir, go right ahead.

Q. Mickey, what tests are known to you to be positive chemical tests for the presence of the drug we call marijuana?

A. We perform three standard examinations at the Laboratory for determining whether or not a substance is marijuana, depending upon the nature of that substance, if it is a leafy material, or plant material, or plant in a natural state. We would examine the material microscopically. That is, by placing a portion of the material under a microscope which would enable you to view this material, oh, at approximately ten to one hundred times the power of resolution of the normal human eye. It would magnify this material. We would examine it for certain physical characteristics associated with the

cannabis or marijuana plant. We would examine it for the presence of cystolithic hairs. These are one cellular, non glandular appendages resembling a bear claw in appearance, in that they are slightly curved and pointed on the tip and much like a hair, just a small short hair under the microscope. They do have a slight swelling at the base, in that they are slightly blunted at the base, or swollen. We would then add a small drop of hydrochloric acid to the material and observe the cystolithic hair at the base for an effervescence or a bubbling indicating the presence of calcium carbonate at the base of the cystolithic hair, cysto meaning pouch, lithic meaning stone. Actually it's a small stone of calcium carbonate at the base of the hair. We would then take a portion of the material, place it into a clean test tube to which was then added a small fraction of patroleum ether, which is a clear solvent much like the light faction found in gasoline, except of a much purer quality. It is a petroleum derivative. This would be allowed to remain in contact with the leafy material for a period of some three to five minutes. Then the liquid or upper layer would be decanted or poured off into a clean evaporting dish, a shallow concave glass dish and allowed to evaporate to dryness on the surface of the dish. Then using a reagent known as the Duquenois reagent, which consists of a mixture of vanillin, acetaldehyde and ethyl alcohol, we would drop this on the surface of this evaporating dish and swirl it to insure mixing. Then using a clean disposable transfer pipette, much like a medicine dropper, we would pick up this liquid and transfer it to another clean test tube, then again adding hydrochloric acid to the material, we would allow it to stand and observe this

material in the test tube for color change. The color would be allowed to develop over a period of some three to five minutes. In this instance we are looking for a violet color. We would then add chloroform to the solvent and being heavier than water it would sink to the bottom of the test tube. Then the tube would be shaken vigorously and allowed to settle to see if the color which had formed in the upper layer would transfer into the lower or chloroform layer of the tube, indicating a positive Duquenois-Levine test for the presence of marijuana. Another portion of the material would then be analyzed using a method known as thin layer chromatography, which again consists of extracting the material by placing some in a test tube, again using petroleum ether and allowing the petroleum ether, after being poured off into an evaporating dish to come down to a few drops, not completely to dryness. Then using a glass plate, approximately the size of a window pane, approximately eight by eight inches square, on one side of this glass plate, approximately the thickness of a fingernail, it's coated with a white pasty powder, a white powder. On the bottom of that plate, approximately one inch from the bottom, we would place these drops of the extract of the suspect material, approximately one inch from the bottom of that place. On the other side of the plate we would place a known extract of a sample of marijuana or cannabis. We would then place this glass plate into a tank filled to approximately one inch depth with benzene, again another petroleum type solvent, a clear solvent. The benzene would then be allowed to migrate up the surface of that plate, much like an ink blotter would soak up a liquid if you would place it, or like a

wick would soak it up, until it would transfer up the surface of that white powder to a pre-determined level, approximately one inch from the top. Then that plate would be taken out and allowed to air dry. The plate would then be looked at or viewed under ultraviolet light and the spots which form up on the plate a a particular height would be noted on both sides. The ultraviolet light would cause them to flouresce [sic] and enable you to see them. In other words, they would glow. Then we would spray that plate with a visualizing spray, a dye, a fast blue B spray, which is specific or reacts with chemicals found in marijuana. The spots at that time which form are of a brick red color, and we compare the exact height of these spots on both sides of the plate as well as the color. Depending upon the color that forms, as well as the height to which those spots migrate up the plate, if they are the same in color and the same in height, we conclude, after having performed these three tests, if we get three positive tests, if each portion of the tests are positive, both the microscopic examination as well as the Duquenois-Levine test as well as the thin layer test, we conclude that the material is marijuana, if in fact, the tests are positive. These are standard tests.

Q. What is the principal ingredient that you are looking for in what we call marijuana?

A. We are looking for Tetrahydo-cannabinol as the primary ingredient, the primary active constituent.

Q. And is this the ingredient for which these tests are designed?

A. One of them, yes, sir.

Q. Now, I am going to start handing you exhibits

here. This is Plaintiff's exhibit 19 to the Testimony of Deputy Ferrell. It's a plastic bag with two plastic bags contained therein. Can you identify that as having been in your possession?

A. Yes, sir, it bears the number 76 731, exhibit number six of the Crime Lab number 76 731 that was given for purposes of record at the Laboratory and these are my initials JMW across the seal on the back where I opened it and then resealed it.

Q. All right, do you know of your own knowledge, did you perform these tests that you have described to the Jury on this particular material in those two bags?

A. Yes, sir, I did.

Q. What were the results of the tests?

A. I concluded that the material contained in each of those bags were marijuana and marijuana seeds.

Q. All right, sir, I hand you a plastic bag designated as exhibit number 18 to the testimony of Deputy Ferrell and contains a blue cup and some seed material. I'll ask you to examine it and tell this Jury whether or not you ran your tests on that substance.

A. I performed the same examinations upon the material contained within this particular package. It also bears this same number with the exception of the letter G, indicating exhibit or item number G, and these are my initials across the same seal across the bottom of that package.

Q. All right, sir, I would like for you to tell this Jury what were the results of your tests on that matter?

A. The tests indicate the presence of marijuana and marijuana seeds.

Q. All right, sir, I hand you a metal ammunition can labled Plaintiff's exhibit 8 to the testimony of Deputy Ferrell, which contains inside a number of plastic envelopes which contain various and sundry materials and ask you to examine that and can you tell us whether you ran tests on those contents?

A. Yes, sir, each of the individual bags that are contained within also bear this same number 76 731, marked item F, and this particular item is four. There are other bags in there with a similar lable [sic] and these are my initials across the bag JMW.

Q. Did you run these tests on each individual bag in there—at least the substance contained in each individual bag?

A. Yes, sir, I did.

Q. And what were the results of those tests?

A. That these materials are either marijuana or marijuana seeds.

Q. All right, I hand you three exhibits that appear to be smoking apparatus of some type, a bamboo pipe, a glass pipe, and a bottle with a tube attached to it, which are exhibits 9, 10 and 11 to the testimony of Deputy Ferrell, and I'll ask you whether you recall running any tests on those three items?

A. Yes, sir, I performed similar examinations upon material removed from the bamboo pipe, from this section, as well as from this section on this side, as well as from the bowl section on this side. All three had similar results in that I detected the presence of marijuana residue in each of these items.

Q. Now, I hand you five pie plates and I'll ask you whether or not you can identify these as having

been examined by you previously?

A. Yes, sir, these all bear the same number 76 731 and these are my initials on those items, and I performed similar tests on these particular items. One other examination was performed on these materials in that these seeds, when they came in, were sprouted. These sprouts were then taken, some of the larger sprouts or longer sprouts were taken out and placed into a small styrofoam cup which contained potting soil and the plant was allowed to grow for three more days until it achieved a certain leaf known as a plant leaf. Only at that time were the two seed leaves present. When the seed leaves were present on these, then of course I planted them to allow them to reach another stage of maturity. The same thing is true about the other seeds that were in the exhibits. I would germinate the seeds and then when the plant from the seed achieved a certain maturity then I would test that plant leaf material for the presence of marijuana, determining whether or not it was a marijuana seed which had produced the plant.

Q. All right, sir, now, when we observe these seeds as they are now, do they differ in appearance now from the way they appeared when you first saw them?

A. Somewhat, in that the small seed leaf and the sprout is dried. The materials, when they were delivered to me on the 23rd day of March, the paper towels were somewhat moist and the leaf material which had formed. the seed leaves, were bright green.

Q. Could you give me a rough estimate of how many seeds or seedlings there are in those five pans?

A. It would be a rough one. I made no effort at all to count those seeds.

Q. Well, would you make an estimate?

BY MR. BOURLAND:

Your Honor, we object, he said he didn't count them.

BY THE COURT:

I'll let him make an estimate. Overruled.

A. It would be a rough estimate at best.

BY MR. BOURLAND:

Your Honor, the witness does not want to answer.

A. It would be strictly a guess, your Honor, on my part.

BY THE COURT:

All right.

BY MR. BENOIST:

Q. Well, let me ask you this about those seedlings. Would you say there was a thousand or more/ [sic]

BY MR. GWIN:

We object to his leading the witness, if your Honor please.

BY THE COURT:

Sustained.

Q. All right, Mr. Williams, it's been testified to that on the date that these pans were found that the seedling sprouts were anywhere from one to four inches in length. Could you tell this Jury in achieving that state of development what length of time would be involved from the time that these seeds were placed in a pan and placed with wet paper and so forth?

BY MR. GWIN:

Just a minute, Mr. Williams. May it please the Court, the Defendant objects to that because this witness, Mr. Williams or Dr. Williams, had the exact exhibits

before him when he made the tests, and counsel has asked him to rely on the testimony of another witness, and we think it's improper.

BY THE COURT:

I agree, Mr. Gwin. Let him testify as to what he found.

BY MR. BENOIST:

Q. From the day you observed them could you tell this Jury when, in your opinion, those seeds would have been first placed in those pans and the moisture added to the towels?

A. In similar tests conducted at the Laboratory in an effort to identify seeds, marijuana seeds, three to seven days are allowed for germination of the seed. That is, when it will break the surface of the seed. The seedling, under room temperature, will grow approximately one inch per day, as much as one inch per day. It may not grow that much, but we have had them to grow as much as one inch per day. If the seedling was four inches long at that time, a period of some four days after germination, it could have been as many as eleven days prior to this that these seeds would have been placed in this container.

BY MR. BENOIST:

That's all, your Honor.

CROSS EXAMINATION

BY MR. BOURLAND.

Q. Mr. Williams, is there any possibility that the tests that you made could identify any other substance?

A. In my opinion, the substance that we are talking about is marijuana.

Q. Yes, sir, but I am really just asking, is there any other substance, for instance, hemp?

A. Well, hemp is the same thing as marijuana.

Q. Right.

A. Except that hemp, when it is prepared as rope, will not give a positive test for this.

Q. Is there any other substance that you know of that will have the same effect?

A. Yes, there are other substances that will give a positive test for one of the tests, but only marijuana gives a positive test for all three, and they are self-eliminating type checks because we do realize that there are chanceable errors. This is why we run three separate examinations because there are substances which will give a positive Duquenois-Levine test, but, for instance, they will not give a positive test or reaction to thin layer: For instance, Rosemary, which is a common type herb which you use in cooking, most of these women will be familiar with Rosemary. Nutmeg is another one that has been reported to give positive Duquenois-Levine test. Certain brands of freeze-dried coffee; here again I have tested freeze-dried coffee in the area of any brand that I can get hold of, and the only one that even gives a remote faint possibility is the freeze-dried coffee known as Maxim's, which bears no characteristics of marijuana, nor does it give a positive thin-layer chromatography test, nor does it give a positive microscopic examination. However, if this were the only field test that you were using and you did not have access to a microscope, nor did you have access for thin-layer chromatography, this

is one of the items that they will tell you that will give a false positive immediately on a field test. This is why we don't use field tests, incidentally.

Q. All right, on this germination period, you say it takes approximately three to seven days at room temperature for the seedling to break its covering or shell?

A. To break its covering, yes.

Q. And from the looks of those, you would say they are approximately about eleven days old?

A. It could have been that or a little longer, yes, sir.

Q. About eleven days?

A. Yes, sir.

Q. You say you all have done tests to try to establish the growing period?

A. Yes, sir. This is a common occurrance at the Laboratory when a police officer or a police department submits seeds, which have no plant material attached with the seeds, just plain seeds.

Q. Yes, sir.

A. The seeds themselves actually have no identifying chemicals in them or of such a low concentration that these tests are rendered useless, so therefore--

Q. All three tests?

A. Yes, sir. Actually you have the microscopic examination which would pick up a lacy seed coat on the test, but as these seeds have been used in things like, as a protein supplement, wild bird seed; for instance, it's mixed in canary seed, has been at one time.

Q. These seeds have been used as bird seeds?

A. Yes, not any more, but they have been, and have also been used as a cattle food supplement or a

protein supplement for cattle. It's rich in some oils which are high in protein, but when they are used for this purpose, they are rendered sterile by radiation. Therefore, if these seeds will germinate we feel that they are not the type that you would find in, for instance, wild bird seed or bird seed that you would use to feed your canary, or as cattle protein supplements which used to be imported in this country. That's the reason for seed germination.

Q. So, just seeds in general, there's no way to accurately test them without growing them, is that correct, sir?

A. You can look at it and say that these are believed to be marijuana seeds, but this could come from bird seed. This is why they are rendered sterile to be used as this or as cattle protein supplement, rendered sterine, [sic] marked by radiation by the Food and Drug Administration.

Q. It would still be marijuana, but it would be sterile?

A. Right. These seeds are not capable of producing a plant, which is by definition, a seed is something that will produce another plant.

Q. But the seed is not the plant.

A. Right, so actually what you have here in technical terms or biological terms, this is an achene--a-c-h-e-n-e. Actually it's a seed within a fruit. This is actually the fruit of the hemp plant, often referred to as a seed because they look like an apple seed, for want of a better word.

Q. So you would say, by your analysis, that these plants here were approximately eleven days old?

A. That is my opinion, yes.

BY MR. BOURLAND:

Thank you very much, that's all.

RE-DIRECT EXAMINATION

BY MR. BENOIST:

Q. Mr. Williams, these two suitcases, being exhibits six and seven to the testimony of Deputy Ferrell--

BY MR. BOURLAND:

Your Honor, we are going to object to this as not being proper re-direct.

BY THE COURT:

Overruled.

BY MR. BENOIST:

Q. I'll ask you whether or not you had occasion to examine the contents of these two suitcases?

A. Yes, sir, I did.

Q. And what were your findings in that regard, sir?

A. Marijuana or marijuana seeds were detected in these suitcases, and in one of them there were a number of stems located in a brown paper bag. I merely recorded that marijuana was detected in this particular suitcase because the stems themselves, from previous examinations when they are large, only the smaller stems and the upper portion of the plants around the leaf will contain chemicals which will enable you to test them, very much like the seeds. So therefore there were also traces of cigarette butts in here and from contamination from the cigarette butts I felt that if I had reported out that

the stems were, in fact, marijuana, I might have been misleading in that possible contamination from cigarette butts or contact with the leafy material may have given a false test, so I merely reported that marijuana was detected in thos suitcases, and did not record a weight.

BY MR. BENOIST.

That's all.

RE-CROSS EXAMINATION

BY MR. BOURLAND:

Q. Then, do you remember the bundle of stems, you did not, in fact, test that bundle of stems?

A. The stems themselves, I did not test, for the simple reason that stems of this size do not normally give a positive examination when not contaminated by being in contact with portions of leaf material or of cigarette butts--

Q. In other words, the small quantity of leaves could have contaminated it?

A. Yes, sir, it could have.

Q. So you are not testifying that those stalks are marijuana?

A. I am not, and I am not giving any weight on those stalks.

Q. Yes, sir, I noticed that you didn't give a weight, and I didn't know why.

A. That's why.

Q. And you are not testifying that the large bulk of matter in that suitcase is marijuana?

A. The stems, I could not say for sure, in my opinion, as to what they might be.

Q. Would you say it was trash in your opinion?

A. All right, what has happened—it could have happened, I am not saying it did because I have no way of proving it--

Q. Well, I don't want to ask you to go where you are not supposed to..

A. All right.

Q. When you were looking in that suitcase, the contaminating material, the possible contaminating material, how much of that was in there? Did you weigh it?

A. No, sir, I did not.

Q. Would you say it was a lot or a little, or--

A. The weight of the bag, as best I can remember, would be less than a half a pound, and its contents.

Q. That's everything?

A. Yes, sir, I'm estimating the weight of the bag and--

Q. And you did not weigh the contaminating as opposed to the opposite?

A. No, sir, I did not.

BY MR. BOURLAND:

That's all, your Honor.

(witness excused)

(R. 157-172) [Emphasis added]

APPENDIX J

IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI
MARCH TERM, 1976

STATE OF MISSISSIPPI

VS. **C. No. 6812**

MARY WYCHE BOUDREAUX and ROBERT DRANE **DEFENDANTS**

MOTION FOR PRODUCTION AND DISCLOSURE OF EVIDENCE

COMES NOW the Defendants Mary Wyche Boudreaux and Robert Drane by their attorney and moves that the Court require the State of Mississippi to furnish the Defendants with the names of any and all witnesses to be used against them, together with the background of the said witnesses, so that the Defendants may give proper investigation into the character and background of said witnesses and so that the Defendants herein may fairly prepare their defense.

Defendants also move that the State of Mississippi be required to disclose and produce for inspection any tangible object to be used in evidence by the State, within the possession and control of the State or others, if obtainable and produceable when the evidence may be favorable to the Defendants and material to the issue of guilt or punishment or could reasonably weaken or

affect any evidence proposed to be introduced against the Defendants, or is relevant to the subject matter of the charge against/the Defendants, and/or the indictment, or in any manner may aid the Defendants in ascertaining the truth, the disclosure and production to be made without regard to whether the evidence to be disclosed or produced is deemed admissible into the trial herein; said disclosure and production should include, but not be limited to, the following:

ONE. The statements of all person, whether oral or documentary, who have been interviewed by law enforcement officers whether the Sheriff's office of Adam's County, Mississippi, or any other officer connected therewith, or any other law enforcement officer known to the State of Mississippi; the memoranda or summaries of any oral or documentary statements made to any such law enforcement officers, private citizens, or by any person in connection with the subject matter of the case, whether or not (a) the statement, if in writing, has been signed or approved by the witness, and (b) the statement relates to the proposed subject matter or testimony of the witness at the trial.

TWO. The stenographic recording or transcription of the audio or video tape, or other electronic evidence, or recordings, of any oral statement made by any person to such law enforcement officers, or to any other person in connection with the subject matter in this case. Specifically, the Defendants would move that the Court order the Sheriff of Adams County to produce all video tape recordings of the actual search of the lands of Mary Wyche Boudreaux both prior to the obtaining of the search warrant and subsequent to the

obtaining of the search warrant.

THREE. The time, date, place, circumstances and names of persons or person present at any event when any of said statements or statement were given, transcribed, video or audio taped or otherwise electronically preserved or made.

FOUR. Any memoranda, documents or statements used by the State during the investigation of this case.

FIVE. The names and addresses of all persons who may have some knowledge of the facts of the present case.

SIX. A summary reflecting the criminal records of all persons the State intends to call at trial and of the Defendants, specifically including all narcotic agents and anonymous informers who may have give [sic] testimony and information to any law enforcement officer.

SEVEN. Any oral or documentary statements made by any police officers, Sheriff's deputies, Sheriff or any other officer connected with any criminal enforcement agency as to any criminal records of the Defendants.

EIGHT. All reports and memoranda prepared on behalf of the State of Mississippi by any of its law enforcement agencies in connection with the investigation of this case and also any written or recorded statements, or a summary of any statement made by the Defendants, or a copy of such statement.

NINE. The identity and any information, oral or written, which was obtained from anonymous informers along with their identity, either of which may have been used by the State of Mississipp.[sic]

TEN. The results of any tests made by the Mississippi State Crime Lab or any other chemist or technicians upon substances obtained from the Defendants, whether favorable or unfavorable to the State.

Respectfully submitted,
By /s/R. Brent Bourland

CERTIFICATE

The undersigned attorney hereby certifies that he has this day personally delivered a true and correct copy of the foregoing Motion for Production and Disclosure of Evidence to the office of the Honorable Edwin Benoist, District Attorney, 329 Market Street, Natchez, Mississipp.[sic]

RECEIVED AND FILED
April 1, 1976
A.V. DAVIS, CIRCUTI[sic] CLERK
By /s/J. M., D.C.

(R. 4-6)